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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 204

CAPITAL TRANSIT COMPANY, *Petitioner*,

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GEORGE D. HORNING, JR.,
FRANK F. ROBERSON,
Counsel for Petitioner.

July 18, 1950.

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To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Capital Transit Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above captioned case on June 5, 1950.

OPINIONS BELOW

The opinion of the District Court (R. 7-10) is reported in 87 F. Supp. 94. The opinion of the United States Court of

Appeals for the District of Columbia Circuit (R. 33-38) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1950. (R. 39.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED

Whether under the Federal Tort Claims Act the United States may be joined as a third party defendant upon a claim for contribution as if it were a private litigant.

STATUTE AND RULE INVOLVED

The pertinent provision of Rule 14(a) of the Federal Rules of Civil Procedure, on Third-Party Practice, and of the Federal Tort Claims Act are printed in the appendix appearing in the Transcript of Record. (R. 17, 14-16.)

STATEMENT

On June 9, 1949, Kenneth Neil Stradley filed a complaint in the United States District Court for the District of Columbia seeking $50,000 damages from petitioner, Capital Transit Company, for personal injuries allegedly sustained on August 4, 1947, in a collision between petitioner's streetcar upon which he was a passenger, and a Ft. Meyer, Virginia jeep. (R. 1-2.) Petitioner sought and obtained leave of court to make the United States a third-party defendant upon the ground that the collision was solely or contributorily caused by the negligence of a Government employee, and judgment-over was sought against the United States for a contributable portion of any judgment awarded Stradley against petitioner. (R. 3, 5, 4-5.) The United States moved to have the third-party complaint dismissed for failure to state a cause of action. (R. 6-7.) After argu-

ment, the District Court rendered an opinion, on October 26, 1949, that a claim for contribution was not permissible under the Federal Tort Claims Act and entered final judgment dismissing the third-party complaint. (R. 7-10, 11-12.)

The court below affirmed the action of the District Court upon the ground that, irrespective of whether contribution came within the liability created by the Federal Tort Claims Act, such a claim could not be asserted in a third-party complaint. (R. 33-38.) The opinion recognized (R. 34-35) that its conclusion was squarely opposed to the holding of the United States Court of Appeals for the Third Circuit in *Howey* v. *Yellow Cab Co.* v. *United States*, 181 F. 2d 967 (April 27, 1950).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia Circuit erred:

1. In holding that a claim against the United States for contribution cannot be entertained through the procedure of a third-party complaint.

2. In failing to hold that the Federal Tort Claims Act permits a claim for contribution against the United States which is maintainable through the same third-party procedure as in the case of private joint tort feasors.

3. In affirming the order of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below in the instant case is directly in conflict with the decision of the United States Court of Appeals for the Third Circuit in *Howey* v. *Yellow Cab Co.* v. *United States*, 181 F. 2d 967 (1950) (R. 29-32.) This conflict was conceded in the court below which frankly stated (R. 35):

We are constrained to disagree with the learned judges of the Third Circuit.

The court below was in part motivated by its own previous holding, in *Sappington* v. *Barrett and United States*, 182 F. 2d 102 (D. C. Cir. April 14, 1950), that the United States could not be joined as a co-defendant with a private tort feasor by a plaintiff to enforce liability. (R. 34, 38.) No writ of certiorari was sought in the latter decision, likewise believed by your petitioner to have been erroneously decided.

2. Clearly, the question presented is of importance in the administration of the Federal Tort Claims Act as it substantially affects the timing, manner of procedure and the area of private suit against the Government. Situations in which the Government is or may be jointly or concurrently negligent with another to cause injury to a third person will inevitably arise many times throughout the country, particularly in motor vehicle accident cases. Settlement of the questions of whether, and the manner in which, the Government may be called upon to bear its proportionate share of the sum awarded an injured person is plainly in the public interest, since the problem is likely to be presented in numerous litigated civil actions, and in addition many settlements advantageous to all concerned will be encouraged once the prospective defendants know their legal rights and liabilities under the national statute involved.

3. The decision below, by the United States Court of Appeals for the District of Columbia Circuit on a question of general importance is believed to be erroneous and the conflicting decision of the United States Court of Appeals for the Third Circuit in *Howey* v. *Yellow Cab Co.* v. *United States*, *supra*, correct. Moreover, in failing to allow contribution the District of Columbia decisions below probably conflict in principle with applicable decisions of this Court. In *United States* v. *Aetna Casualty & Surety Co.*, 338 U. S.

366 (1949), this Court *held* that an insurance company which had paid compensation to an injured worker could bring suit in its own name against the United States under the Federal Tort Claims Act. The Court, in its opinion by the Chief Justice pointed out, at 383:

> In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson* v. *Hayes Construction Co.*, 243 N. Y. 140, 147: "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

Nevertheless, the District Court below frankly admitted that its holding was an application of the ancient rule of strict construction of statutes waiving sovereign immunity (R. 8-9), and the opinion below of the United States Court of Appeals for the District of Columbia Circuit, while paying lip-service to the *Aetna* case (R. 38), failed to apply its plain spirit and principle in declining to treat the United States as if it were a private litigant. There can be no question that in the District of Columbia a private person, situated as the Government is in the instant case, could be required to bear his proportionate share of a judgment in favor of the injured person through the procedure of a third-party complaint for contribution. *Knell* v. *Feltman*, 85 U. S. App. D. C. ———, 174 F. 2d 662 (1949). To be contrasted with the opinions of the District of Columbia courts is that of the United States Court of Appeals for the Third Circuit, in *Howey* v. *Yellow Cab Co.* v. *United States*, *supra*, which felt itself supported by the *Aetna* case in concluding that it was the intention of Congress (R. 30):

> * * * to put the United States on a precise parity with the private litigant in suits cognizable under the FTCA.

The effect of the District Court's dismissal of the third-party complaint herein is to create a thirteenth exception to the twelve which Congress enumerated in the Federal Tort Claims Act. Such judicial legislation conflicts in principle with the action of this Court, which in *Brooks* v. *United States*, 337 U. S. 49, 51 (1949), declined to be persuaded that the words "any claim" in the Federal Tort Claims Act meant "any claim but that of servicemen". The absence of an exception dealing with contribution was properly felt by the Third Circuit Court of Appeals in the *Howey* case to be a cogent argument in favor of joinder (R. 27), whereas in failing to sustain petitioner's contentions the Court of Appeals for the District of Columbia Circuit remained unmoved by this recognized principle of statutory construction.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE D. HORNING, JR.,
FRANK F. ROBERSON,
Counsel for Petitioner.

July 18, 1950.